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NO. 56603-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

EDWARD JAMES STEINER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable Brent Basden, Judge

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BRIEF OF APPELLANT

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LUCIE R. BERNHEIM  
KEVIN A. MARCH  
Attorneys for Appellant

NIELSEN KOCH & GRANNIS, PLLC  
The Denny Building  
2200 Sixth Avenue, Suite 1250  
Seattle, WA 98121  
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The prosecution engaged in flagrant and ill-intentioned misconduct by improperly and repeatedly invoking contempt for and aggression toward law enforcement and the rule of law at Edward James Steiner's trial.

2. The trial court erred in imposing discretionary Department of Corrections community custody supervision fees.

Issues Pertaining to Assignments of Error

1. Did the prosecutor's opening statement and closing argument regarding Mr. Steiner's disdain and disrespect for law enforcement and the rule of law constitute flagrant and ill-intentioned misconduct?

2. Despite finding Mr. Steiner indigent and stating its intention to impose only mandatory legal financial obligation, the judgment and sentence nevertheless orders Mr. Steiner to pay community custody supervision fees determined by the Department of Corrections. Based on recent Washington

Supreme Court precedent, should these discretionary fees be stricken from the judgment and sentence?

B. STATEMENT OF THE CASE

On August 25, 2021, the state charged Mr. Steiner with one count of assault in the third degree and one count of felony harassment, both alleged to have occurred on or about August 22, 2021. CP 54-55. The charges arose from allegations that he threatened and assaulted Brent Kemester, a law enforcement officer. CP 54-55. The state filed an amended information on November 23, 2021 amending the felony harassment charge to a gross misdemeanor. CP 50-51.

In his opening statement, the prosecutor told jurors that the case before it “really comes down to one person’s decision to show contempt, . . . frustration, . . . annoyance, . . . anger, what have you, at being contacted by a law enforcement officer. RP 191. The state further accused Mr. Steiner of “using derogatory slurs toward [Officer Kemester] just because he’s in uniform” and “threatening Officer Kemester . . . because he’s a cop.” RP

192. The state continued, “the defendant is still threatening Officer Kemester because he’s there, because he’s a cop . . .” RP 192. Defense did not object at any point during the state’s opening statement.

Officer Kemester testified that he was on duty on August 22, 2021 and in uniform. RP 199, 200. As a typical part of his patrol duty, he testified that he went to the Lonesome Creek Store located in Clallam County on the Quileute Reservation. RP 200. Upon arrival he observed Mr. Steiner who appeared intoxicated and was gesturing toward another patron. RP 201. Officer Kemester testified that there was a tribal law prohibiting public intoxication on the Quileute Reservation. RP 203.

A store employee told Officer Kemester that she had noticed Mr. Steiner intoxicated at the storefront for the last two days. RP 203. Officer Kemester contacted Mr. Steiner and told him it was illegal to be intoxicated in public. RP 203-04. He testified that Mr. Steiner “told me he didn’t like fagot cops and he would kick my ass and kill me.” RP 204. When asked how these

statements made him feel, Officer Kemester testified that it put him “on alert,” that he took the threats “to heart,” and that he could “think of only one other incident in which I encountered someone who was so utterly set on being offensive verbally and aggressive verbally.” RP 205. Officer Kemester tried unsuccessfully to get Mr. Steiner to identify himself and eventually informed Mr. Steiner that he was permanently trespassed from the reservation. RP 206. He called for backup. RP 206.

Officer Kemester testified Mr. Steiner gestured toward him with his credit card and told him he was going to “kill [him] by cutting off his balls.” RP 213. In his training and experience, Officer Kemester testified, “a credit card can have a razor taped to it and I know that someone who is possibly transient almost always carries some form of edged weapon, so I believe yes, that it was something that could cause me significant harm.” RP 213.

Eventually, Mr. Steiner decided to leave the store and Officer Kemester followed him out. RP 214. When Mr. Steiner



tried to grab condiments on the way out, Officer Kemester testified that he prevented him from taking them and pushed him out the door. RP 214. Mr. Steiner sat on a log outside the store and Officer Kemester continued to attempt to identify him. RP 214-15. Officer Kemester testified Mr. Steiner then spit in Officer Kemester's face. RP 216. The spit caused him concern and he found it offensive. RP 216, 217. Officer Kemester testified that he placed Mr. Steiner over the log on which he sat and attempted to handcuff him. RP 218. He informed Mr. Steiner he was detained. RP 218. He testified Mr. Steiner did not cooperate physically and that, when he was able to handcuff Mr. Steiner, he noticed bleeding on Mr. Steiner's right wrist. RP 218.

Nicole Wheeler, a cashier at the Lonesome Creek Store, testified that she was working at the store on August 22, 2021. RP 228. She noticed a man later identified as Mr. Steiner purchasing alcohol and cigarettes and disturbing other customers while he was outside the store with an open container. RP 229. She testified that under tribal law "you're not allowed to have an

open container in a public area.” RP 229. Her coworker called the police and Mr. Steiner came back inside the store. RP 229. Ms. Wheeler testified that she was instructed not to sell anything to Steiner. RP 230.

Ms. Wheeler further testified that Officer Kemester identified himself as police to Mr. Steiner. RP 231. While at the store counter, Mr. Steiner “continued to make the same kind of threats, you know, telling him to get away from him and kind of like luring at him . . . and acting like he was gonna lunge at him . . .” RP 231. When asked to detail the threats she heard, Ms. Wheeler testified Mr. Steiner told Officer Kemester not to touch him, to go away, to leave him alone, that he “wasn’t going to like what happens,” and that “Officer Kemester was a faggot.” RP 232. She testified that Mr. Steiner told Officer Kemester that “he was going to kick his ass. . .” RP 232. Officer Kemester removed Mr. Steiner from the store after Mr. Steiner lunged at him. RP 233.

Ms. Wheeler testified Mr. Steiner did not leave the store willingly and that the two struggled down the stairs. RP 234. She testified that she saw Mr. Steiner “tip himself over . . . and hit his head . . .” RP 235. She walked out “just as [Mr. Steiner was spitting] so I’m not entirely certain what happened” but that she heard a sound associated with spitting. RP 235. She did not see Officer Kemester intentionally injure Mr. Steiner. RP 236.

April Blair-Pullen, another cashier at the Lonesome Creek Store, testified that she was also working at the store on August 22, 2021. RP 237-38. She noticed Mr. Steiner drinking a beer in public and when she saw Officer Kemester already on the scene, she asked him if he could address the issue with Mr. Steiner because Mr. Steiner was making customers uncomfortable. RP 238. 239. She heard Officer Kemester ask Mr. Steiner who he was and heard Mr. Steiner decline to identify himself. RP 239. She testified generally that Mr. Steiner was threatening Officer Kemester’s life while the two were outside the store. RP 240. When Officer Kemester followed Mr. Steiner into the store, Ms.

Blair-Pullen testified that Mr. Steiner told Kemester he was going to “cut his head off and shoot him.” RP 241. At this point, Ms. Blair-Pullen said she stepped outside the store. RP 241. From outside, she observed Mr. Steiner return to the log outside the store and saw that Officer Kemester followed him. RP 242. She then saw Mr. Steiner spit on Officer Kemester. RP 242. Officer Kemester was eventually able to handcuff and arrest Mr. Steiner. RP 244. She saw blood on what she thought was Mr. Steiner’s head. RP 244-45.

Mr. Steiner testified that he was present at the Lonesome Creek Store on August 22, 2021. RP 248. He bought a newspaper, a beer, and some cigarettes. RP 249. He testified that Officer Kemester then trespassed him from the store and ordered him to put his hands behind his back. RP 250. Mr. Steiner testified that he was compliant and that, when he and Officer Kemester were exiting the store, Officer Kemester shoved him out of the store’s surveillance camera view. RP 250. He denied threatening Officer Kemester. RP 251. Mr. Steiner testified that

Officer Kemester hit him twice in the sternum and pushed him to the ground. RP 251. He denied spitting on Officer Kemester and testified that, at the time, he had his mask on. RP 256.

On cross-examination, Mr. Steiner testified that when Officer Kemester told him he was trespassed from the store, he replied that he was not trespassed. RP 269. The prosecutor asked him repeatedly whether he was drinking in public. RP 258, 270.

On rebuttal, Officer Kemester denied punching Mr. Steiner or pushing him to the ground. RP 272. Officer Kemester testified that while the Lonesome Creek Store has cameras outside of the store, they were not operational on August 22, 2021. RP 274.

During closing argument, the prosecutor echoed that the case “boils down to . . . the contempt of [sic] disrespect, disregard, for the rule of law, a disregard for an officer just out doing his job.” RP 297-98.

The jury convicted Mr. Steiner of assault in the third degree and harassment. RP 318.

The court sentenced Mr. Steiner to 38 months on count I and 364 days on count II. RP 347; CP 21. The court imposed 12 months of community custody, found that chemical dependency contributed to the offense, imposed legal financial obligations of \$500, and prohibited Mr. Steiner from returning to the Quileute Reservation. RP 347-48; CP 21.

At sentencing, the trial court stated, “I am going to find that you’re indigent and will only impose the mandatory legal financial obligations in this matter . . . .” RP 348. Nevertheless, the judgment and sentence requires Mr. Steiner to “pay [community custody] supervision fees as determined by DOC[.]” CP 22.

Mr. Steiner timely appeals. CP 7.

C. ARGUMENT

1. **Mr. Steiner was denied his right to a fair trial due to prosecutorial misconduct during the state’s opening statement and closing argument**

Mr. Steiner was denied his right to a fair trial when the prosecutor committed flagrant and ill-intentioned misconduct

during opening and closing argument. The prosecutor attempted to inflame and invite the jury to decide the case on an emotional basis. The Court of Appeals should accordingly reverse Mr. Steiner's convictions.

Prosecutorial misconduct may deprive a defendant of a fair trial guaranteed under the state and federal constitutions. Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012). The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967 (1999).

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. State v. Walker, 182 Wn.2d 463, 477, 341 P.3d 976 (2015). Prejudice is established where there is a substantial

likelihood that the misconduct affected the jury's verdict. Glasmann, 175 Wn.2d at 704. Where a defendant fails to object, the defendant must also establish that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. State v. Loughbom, 196 Wn.2d 64, 70, 470 P.3d 499 (2020).

Prosecutors are officers of the court and have a duty to ensure that the defendant receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Prosecutors are expected to “subdue courtroom zeal,” not add to it, in order to ensure the defendant receives a fair trial. Loughbom, 196 Wn.2d at 64. The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury. Glasmann, 175 Wn.2d at 704. Exhorting the jury to cure a social problem is an improper appeal to the jury’s passions and prejudices. State v. Thierry, 190 Wn. App. 680, 690, 360 P.3d



940 (2015); State v. Ramos, 164 Wn. App. 327, 338, 264 P.3d 1268 (2011).

The prosecutor's repeated invocation of a general theme of aggression or disrespect toward law enforcement and toward the rule of law was a thematic narrative designed to invoke a broader social idea that officers face aggression and disrespect rather than focus jurors on anticipated evidence, and his doing so deprived Mr. Steiner of a fair trial. "A prosecutor's opening statements should be confined to a brief statement of the issues of the case, an outline of the anticipated material evidence, and reasonable inferences to be drawn therefrom." State v. Campbell, 103 Wn.2d 1, 15-16, 691 P.2d 929 (1984). "Argument and inflammatory remarks have no place in the opening statement." State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976). Using the first opportunity to address jurors to convey the idea that the case "really comes down to" and "boils down to" contempt for law enforcement—notably not an element of either crime with which Mr. Steiner was charged—signaled to jurors that the contempt

police face, rather than the evidence presented, should be the focus in their decision making. RP 191, 297-98.

Mr. Steiner's purported attitude toward law enforcement was irrelevant to the question of his guilt on either count, yet the prosecution focused on this in both opening and closing argument, stating it was what the case "really boil[ed] down to." RP 297-98. As in Loughbom, where the Washington Supreme Court held a prosecutor's references to the war on drugs improper in a drug prosecution, here the prosecutor's repeated improper references to contempt for law enforcement in an assault of an officer trial "set the tone for the entire trial." 196 Wn.2d at 71. This theme was strategically employed at both ends of Mr. Steiner's trial. RP 191, 192, 297-98. Remarks made at the beginning of the prosecutor's opening and at the beginning of closing argument must be understood as "'a prism through which the jury should view the evidence.'" Id. at 76 (quoting State v. Ramos, 164 Wn. App. at 340. Though in closing argument the prosecutor did discuss with the jury relevant evidence presented

at trial, the prosecutor's rhetoric employed at the beginning of both opening and closing arguments instead urged jurors to focus on what the case really "boil[ed] down to": contempt for the police. RP 297.

The prosecutor's use of this inflammatory theme was meant to appeal to juror's passions and vilify Mr. Steiner, not to outline anticipated evidence and "seek convictions based only on probative evidence and sound reason." Id. at 77. The prosecutor's statements in both opening and closing regarding Mr. Steiner's disdain for law enforcement were improper.

Despite Mr. Steiner's failure to object to this misconduct during trial, the prosecutor's inflammatory framing of the case really being about aggression toward law enforcement and the prosecutor's repetition of this theme both in opening and closing argument caused incurable prejudice. RP 191, 192, 297-98. Having no bearing on the case at hand, these statements were designed to arouse passion and prejudice regarding aggression toward law enforcement by "boiling" the case down to this theme

rather than the evidence presented. RP 297-98. This tactic tainted Mr. Steiner's convictions and an instruction could not have cured the resulting prejudice.

**2. Discretionary community custody supervision fees should be stricken from the judgment and sentence**

The trial court imposed only mandatory financial obligations on Mr. Steiner based on indigency. CP 23. At sentencing, the trial court stated, "I am going to find that you're indigent and will only impose the mandatory legal financial obligations in this matter . . . ." RP 348. Nonetheless, the judgment and sentence requires Mr. Steiner to "pay supervision fees as determined by" the Department of Corrections as a condition of community custody. CP 22.

The community custody supervision fees are discretionary legal financial obligations. State v. Bowman, 198 Wn.2d 609, 629, 498 P.3d 478 (2021). Because they are discretionary, they may be stricken if it appears they would not have been imposed had the court exercised its discretion. Id. Because the trial court

imposed only mandatory financial obligations and stated it would not impose discretionary financial obligations based on indigency, the discretionary community custody supervision fees should be stricken from the judgment and sentence. See id.

D. CONCLUSION

Mr. Steiner was denied his right to a fair trial due to flagrant and ill-intentioned prosecutorial misconduct. His convictions must be reversed.

DATED this 12th day of August, 2022.

**We certify this document contains 2,880 words. RAP 18.17.**

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC

A handwritten signature in black ink, appearing to read 'Kevin A. March', written over a horizontal line.

LUCIE R. BERNHEIM, WSBA No. 45925

KEVIN A. MARCH, WSBA No. 45397

Office ID No. 91051

Attorneys for Appellant

**NIELSEN, BROMAN & KOCH, PLLC**

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Sender Name: Kevin March - Email: marchk@nwattorney.net  
Address:  
2200 6TH AVE STE 1250  
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